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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALBERT M. CHAVEZ et al., Plaintiffs and Appellants, v. MORONGO CASINO RESORT & SPA, Defendant and Respondent.	E056191 (Super.Ct.No. RIC1112191) OPINION

APPEAL from the Superior Court of Riverside County. Gloria Connor Trask, Affirmed.

Law Office of Frank E. Marchetti and Frank E. Marchetti for Plaintiffs and Appellants.

Forman & Associates, George Forman, Kimberly A. Cluff, Jay B. Shapiro and Jeffrey R. Keohane for Defendant and Respondent.

Albert M. Chavez, Markist Herbert, Rudy Reyes, George W. Robinson, Jr., John R. Stutzman, Jr., and Michael L. Thompson (collectively, "Employees") are former employees of Morongo Casino Resort & Spa. Employees sued (1) Morongo Casino

Resort & Spa (Morongo), also known as Morongo Gaming Agency, and also known as Morongo Band of Mission Indians; (2) Jerry Schultze (Schultze), the Executive Director for the Morongo Gaming Agency; as well as (3) various Morongo management members, for (1) retaliation based upon discrimination (Gov. Code, § 12940, subd. (h)); (2) discrimination (Gov. Code, § 12940, subd. (a)); (3) age discrimination (Gov. Code, § 12940); (4) sexual discrimination (Gov. Code, § 12940); (5) harassment, in violation of the Fair Employment and Housing Act (FEHA); (6) wrongful termination, in violation of FEHA and public policy; (7) failure to prevent workplace discrimination; (8) intentional infliction of emotional distress; (9) negligent infliction of emotional distress; (10) defamation; and (11) breach of contract.

The lawsuit was filed in Riverside County Superior Court. The trial court ordered the complaint and service of the summons be quashed because the trial court lacked jurisdiction over Morongo, due to Morongo being "immune to unconsented" lawsuits, and not having consented to Employees' suit. Therefore, the trial court ordered Employees' lawsuit dismissed in its entirety without leave to amend.

Employees present three issues on appeal. First, Employees contend the trial court erred because "'Section 4 of Public Law 280'" (28 U.S.C. § 1360, hereinafter, "section 1360") abrogated Morongo's sovereign immunity in relation to civil claims. Second, in the alternative, Employees assert the trial court erred because, in Morongo's 2008 Amended Compact with the State of California, Morongo expressly agreed to waive its sovereign immunity in relation to bodily injury, property damage, or personal injury arising out of operating the casino. Third, Employees assert the trial court erred

by (a) preventing Employees from petitioning the court for an order compelling arbitration, and (b) not ordering the parties to participate in arbitration. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

Employees are non-Indians who were employed by Morongo. They worked in Morongo's security department. Employees were terminated at different times during the years 2010 and 2011. Employees filed their complaint in Riverside County Superior Court on July 21, 2011.

B. FEDERAL LAW

Section 1360(a) provides: "Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." Included on the table is "California[—]All Indian country within the State."

C. COMPACT

The relevant portion of the 2008 Amended Compact between Morongo and the State of California (the Compact) provides: Section 10.2(d)(i) "The Tribe shall obtain and maintain a commercial general liability insurance policy consistent with industry

standards for non-tribal casinos and underwritten by an insurer with an A.M. Best rating of A or higher ('Policy') which provides coverage of no less than ten million dollars ($10,000,000.00) per occurrence for bodily injury, property damage, and personal injury arising out of, connected with, or relating to the operation of the Gaming Facility or Gaming Activities. In order to effectuate the insurance coverage, the Tribe shall waive its right to assert sovereign immunity up to the limits of the Policy in accordance with the tribal ordinance referenced in subdivision (d)(ii) below in connection with any claim for bodily injury, property damage, or personal injury arising out of, connected with, or relating to the operation of the Gaming Facility, including, but not limited to, injuries resulting from entry onto the Tribe's land, except such lands that are closed to the general public, for purposes of patronizing the Gaming Facility or providing goods or services to the Gaming Facility; provided, however, that nothing herein requires the Tribe to agree to liability for punitive damages or to waive its right to assert sovereign immunity in connection therewith. The Policy shall acknowledge that the Tribe has waived its right to assert sovereign immunity for the purpose of arbitration of those claims up to the limits of the Policy referred to above and for the purpose of enforcement of any ensuing award or judgment and shall include an endorsement providing that the insurer shall not invoke tribal sovereign immunity up to the limits of the Policy; however, such endorsement or acknowledgement shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity beyond the Policy limits.

"(ii) The Tribe shall maintain in continuous Force its Tort Liability Ordinance which shall, prior to the effective date of this Amendment and at all times hereafter, continuously provide at least the following:

"(A) That California tort law shall govern all claims of bodily injury, property damage, or personal injury arising out of, connected with, or relating to the operation of the Gaming Facility or the Gaming Activities, including, but not limited to, injuries resulting from entry onto the Tribe's land, except such lands that are closed to the general public, for purposes of patronizing the Gaming Facility or providing goods or services to the Gaming Facility, provided that any and all laws governing punitive damages need not be a part of the Ordinance.

"(B) That the Tribe waives its right to assert sovereign immunity with respect to the arbitration and court review of such claims but only up to the limits of the Policy; provided, however, such waiver shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity beyond the Policy limits.

"(C) That the Tribe consents to binding arbitration before a single arbitrator, who shall be a retired judge, in accordance with the comprehensive arbitration rules and procedures of JAMS (or if those rules no longer exist, the closest equivalent) to the extent of the limits of the Policy, that discovery in the arbitration proceedings shall be governed by section 1283.05 of the California Code of Civil Procedure, that the Tribe shall initially bear the cost of JAMS and the arbitrator, but the arbitrator may award costs to the prevailing party not to exceed those allowable in a suit in California Superior Court, and that any party dissatisfied with the award of the arbitrator may at

the party's election invoke the JAMS Optional Arbitration Appeal Procedure (or if those rules no longer exist, the closest equivalent), provided that the party making such election must bear all costs and expenses of JAMS and the arbitrations associated with the Appeal Procedure regardless of the outcome. To effectuate its consent to the foregoing arbitration procedure, the Tribe shall, in the exercise of its sovereignty, waive its right to assert its sovereign immunity in connection with the arbitrator's jurisdiction and in any action brought in federal court or, if the federal court declines to hear the action, in any action brought in the courts of the State of California that are located in Riverside County, including courts of appeal, to (1) enforce the parties' obligation to arbitrate, (2) confirm, correct, modify, or vacate the arbitral award rendered in the arbitration, or (3) enforce or execute the judgment based upon the award. The Tribe agrees not to assert, and will waive, any defense alleging improper venue or forum non conveniens as to such courts.

"(D) The Ordinance may require that the claimant first exhaust the Tribe's administrative remedies, if any, for resolving the claim (hereinafter the 'Tribal Dispute Resolution Process') in accordance with the following standards:

"(1) Upon notice that a claimant alleges to have suffered an injury or damage, the Tribe or the Tribal Gaming Agency shall provide notice by personal service or certified mail, return receipt requested, that the claimant is required within one hundred eighty (180) calendar days of receipt of the written notice ('limitation period') to proceed with the Tribal Dispute Resolution Process.

"(2) The claimant must bring his or her claim within one hundred eighty (180) days of receipt of the written notice of the Tribal Dispute Resolution Process as long as the notice specified in subdivision (1) has been satisfied.

"(3) The arbitration may be stayed until the completion of the Tribal Dispute Resolution Process or one hundred eighty (180) days from the date the claim was filed, whichever first occurs, unless the parties mutually agree upon a longer period.

"(4) The decision of the Tribal Dispute Resolution Process be a reasoned decision, and shall be rendered within one hundred eighty (180) days from the date the claim was filed.

"(iii) Upon notice that a claimant claims to have suffered an injury or damage covered by this Section, the Tribe shall provide notice by personal service or certified mail, return receipt requested, that the claimant is required within the specified limitation period to first exhaust the Tribal Dispute Resolution Process, if any, and if dissatisfied with the resolution, is entitled to arbitrate his or her claim before a retired judge.

"(iv) Failure to comply with this Section 10.2, subdivision (d) shall be deemed a material breach of the Compact."

D. MOTION TO QUASH

Morongo and the individual defendants specially appeared at the trial court, moving the court to quash the complaint and service of summons. Morongo asserted the documents should be quashed because "Morongo Band is a federally-recognized American Indian tribe [citation] that is immune from unconsented suit and has not

consented either to the creation of the purported causes of action alleged against it or to this Court's jurisdiction to adjudicate those purported causes of action against any of the defendants . . . ." Morongo asserted the individual defendants were sued in their official capacities, and thus were "cloaked with the Morongo Band's sovereign immunity," and therefore were also not subject to the trial court's jurisdiction.

Morongo argued that it could only be subject to the trial court's jurisdiction if it expressly waived its sovereign immunity, and no waiver was made that would allow for jurisdiction in Employees' lawsuit. Morongo argued that *Bryan v. Itasca County* (1976) 426 U.S. 373, 388-389, held section 1360 permits "certain civil causes of action" involving Indians in Indian Country to be adjudicated in state courts, but the statute does not confer jurisdiction over the tribes themselves and does not abrogate tribal immunity.

Morongo further asserted the Compact did not abrogate Morongo's tribal immunity. Morongo argued the Compact did not authorize direct lawsuits from private individuals, rather, at most, there could be a breach of the Compact that only the State of California could enforce if Morongo did not abide by certain agreements.

In Morongo's motion, it noted that another gaming compact, between the State of California and the Shingle Springs Rancheria, was similar to Morongo's amended compact with the State; however, the Shingle Springs Rancheria compact included employment-specific provisions, which are not included in Morongo's compact. The Shingle Springs Rancheria compact required the tribe to "obtain and maintain an employment practices liability insurance policy consistent with industry standards," and

provided the Shingle Springs tribe waived its sovereign immunity up to the policy's limits "in connection with any claim for harassment, retaliation, or employment discrimination arising out of the claimant's employment in, in connection with, or relating to the operation of, the Gaming Operation, Gaming Facility or Gaming Activities."

Morongo argued that since similar employment provisions are not included in the Morongo Compact, then the Morongo Compact did not permit an employee to sue Morongo in state court, instead, an employee would have to "go through the tribal process, and if dissatisfied, they can go to JAMS arbitration."[1] Morongo reasoned that the Shingle Springs compact was similar to the Morongo compact, except for the employment provisions, so if the tort provisions that appeared in both compacts were meant to include employment, then the employment provisions in the Shingle Springs compact would be superfluous. Morongo further asserted the causes of actions alleged by Employees were civil rights violations, which are distinct from torts. Thus, Employees did not allege tort causes of actions.

E. OPPOSITION

In regard to the federal law (§ 1360), Employees argued it permitted state civil laws to be applied to tribal operations if the application of the law "would not impair tribal sovereignty." Employees asserted Morongo was already complying with state and

[1] At oral argument in this court, Morongo clarified its argument was that Employees should proceed via the Worker's Compensation claims process, as opposed to arbitration.

federal employment laws, as agreed to in the Compact, so Employees' lawsuit would not infringe on the tribe's control of its affairs.

F. REPLY

Morongo replied to Employees' opposition. Morongo asserted the Compact required Morongo to adhere to particular standards and "create remedies for patrons and certain others claiming to have suffered personal injury or property damage in connection with the operation" of the casino; however, Morongo asserted "nowhere in the Compact is there any express or even implied waiver of Morongo's immunity to a direct private suit for money damages or other relief. Rather, the Compact permits only the *State* to bring suit against Morongo for violation of the Compact, and then only if the State first has exhausted the dispute-resolution provisions of the Compact." Morongo also asserted the Compact did not require Morongo to comply with state and federal employment laws—in contrast to the Shingle Springs compact—so Employees were incorrect that Morongo was required to have employment laws similar to the state and federal governments.

G. HEARING

On January 27, 2012, the trial court held a hearing in the matter. The court's tentative opinion was that the court lacked jurisdiction. The trial court explained that Morongo would have needed to explicitly waive its sovereign immunity, in order for the trial court to have jurisdiction—a waiver of immunity cannot be implied. The trial court found "the only immunity waiver the Morongo tribe has given for tort claims is conditioned upon complying with and exhausting the tribes own tort claims procedure

before demanding arbitration. Otherwise, there is no authority to bypass Morongo tribe—Morongo's tribal process and arbitration by suing for money damages."

Employees argued Morongo expressly agreed in the Compact to abide by state and federal anti-discrimination laws. Additionally, Employees asserted they submitted documents to the tribe to initiate the arbitration process, but did not receive a response. Employees argued Morongo could "do whatever it wants to [d]o [with] its employees," if the tribe ignored its own arbitration process, which would "shock[] the conscience."

The trial court responded, "I have heard this on a number of occasions for many years dating, I think, all the way back to when I first started and when somebody slipped and fell at one of the spas and was shocked to find out that they could not sue the Indians for their slip and fall."

Morongo argued Employees' causes of action are not "torts under California law to the extent that they relate to employment-based issues." Additionally, to the extent Employees' claims were torts, there was nothing in the complaint indicating Employees complied with the tribe's tort claims process such that Employees "would be entitled to demand de novo arbitration and then sue to enforce or confirm an arbitration award."

The trial court granted Morongo's motion to quash. The court ordered Employees' lawsuit be dismissed in its entirety, without leave to amend, due to a lack of jurisdiction.

DISCUSSION

A. FEDERAL LAW

Employees contend the trial court erred because section 1360 abrogated Morongo's sovereign immunity from civil claims.

The interpretation of a statute presents a question of law, which we review de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) As set forth *ante*, section 1360(a) provides: "Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." Included on the table is "California[—]All Indian country within the State."

"[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." (*California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 207.) This court has previously explained, "While the sovereign immunity of the Indian nations is subject to the pleasure of Congress, a congressional waiver 'is not to be lightly implied, but must be unequivocally expressed.' [Citation.] Any ambiguity found in section 1360 must be resolved in favor of the Indians. [Citations.]" (*Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d 853, 857 [Fourth Dist., Div. Two] (*Long*).)

This court went onto write, "No case has been cited to us, and we have found none, which concludes or even suggests, that . . . section 1360 conferred on California jurisdiction over the Indian tribes, as contrasted with individual Indian members of the tribes." (*Long*, *supra*, 115 Cal.App.3d at p. 857.) This court continued, "Congress, in passing . . . section 1360, could have easily expressed its intent to grant the listed states complete jurisdiction over its resident tribes. Congress' failure to so act must be read as a purposeful decision to reserve to the federal government jurisdiction over the tribes themselves. [Citations.]" (*Id.* at p. 858, fn. omitted.)

Another California appellate court concluded, "It is settled . . . section 1360 confers jurisdiction only over individual Indians, and not over Indian tribes or tribal entities. [Citations.]" (*Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1427 (*Great Western*).) Similarly, the United States Supreme Court wrote, "We have never read Pub.L. 280 [(section 1360)] to constitute a waiver of tribal sovereign immunity . . . ." (*Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering* (1986) 476 U.S. 877, 892.)

Given the foregoing law, we conclude section 1360 did not abrogate Morongo's sovereign immunity. The statute has not been interpreted as abrogating tribal immunity and Employees have not presented new law or reasoning that would cause us to break from this settled interpretation of section 1360. Since section 1360 does not abrogate Morongo's tribal immunity, we conclude California did not have jurisdiction over Morongo for purposes of this lawsuit.

In regard to the individuals who were named as defendants, the law provides: "Tribal officials are not necessarily immune from suit. [Citation.] When tribal officials act beyond their authority they lose their right to the sovereign's immunity. [Citations.] On the other hand, sovereign immunity does extend to tribal officials when they act in their official capacity and within the scope of their authority. [Citations.]" (*Great Western, supra*, 74 Cal.App.4th at p. 1421.)

The individual defendants were: (1) Jerry Schultze, Executive Director for the Morongo Gaming Agency/Security Director; (2) Ralph Chapman, Lieutenant and Watch Commander in the Morongo Security Department; (3) Robert Ferrell, Human Resources Director for Morongo's Tribal Administration; (4) Rod Mercado, Human Resources Manager for Morongo's Tribal Administration; and (5) Neal Reed, Administrative Lieutenant in Morongo's Security Department. Employees' complaint alleged the foregoing defendants "were acting in the course and scope of such agency [and] employment" with Morongo at the time the harassment and other acts allegedly occurred.

Since the individual defendants were named in the lawsuit as part of their official duties, acting on behalf of the tribe, it appears the trial court correctly concluded the individuals were also protected by the tribe's sovereign immunity.[2] As a result, we

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[2] It is unclear if the individuals are "tribal officials"; however, the "tribal officials" issue is not raised by Employees—they focus on Morongo, rather than the individuals—so we do not delve into the issue any deeper than this notation. (See *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 [appellant has the burden of demonstrating error].)

conclude the trial court did not err by including the individual defendants when concluding there was no jurisdiction in this case. In sum, section 1360 does not provide California with jurisdiction over defendants; the trial court did not err.

Employees assert it is nonsensical to interpret section 1360 as applying only to individual Indians, as opposed to the tribal entity. Employees contend such an interpretation renders section 1360 "superfluous" and causes it to have "no effect whatsoever." Contrary to Employees' argument, the settled interpretation of section 1360 does not render section 1360 superfluous. The law clarifies that the sovereign's immunity does not extend to individual tribe members when they act outside of their official capacities. Accordingly, the law has meaning and is not superfluous.

B. 2008 AMENDED COMPACT

Employees contend Morongo waived its sovereign immunity in its 2008 Amended Compact with the State of California.

We apply the de novo standard of review when interpreting a contract. (*Windsor Pacific LLC v. Sanwood Co., Inc.* (2013) 213 Cal.App.4th 263, 273.) "Our goal in interpreting a contract is to give effect to the mutual intention of the contracting parties at the time the contract was formed. [Citation.]" (*Id.* at p. 274.) We ascertain that intention by looking to the words of the contract and giving the words their plain and ordinary meanings. (*Ibid.*) As set forth *ante*, a waiver of sovereign immunity "'is not to be lightly implied, but must be unequivocally expressed.' [Citation.]" (*Long, supra*, 115 Cal.App.3d at p. 857.)

The Compact reflects: "[T]he Tribe waives its right to assert sovereign immunity with respect to the arbitration and court review of such claims but only up to the limits of the Policy." The Compact further provides, "To effectuate its consent to the foregoing arbitration procedure, the Tribe shall, in the exercise of its sovereignty, waive its right to assert its sovereign immunity in connection with the arbitrator's jurisdiction and in any action brought in federal court or, if the federal court declines to hear the action, in any action brought in the courts of the State of California that are located in Riverside County, including courts of appeal, to (1) enforce the parties' obligation to arbitrate, (2) confirm, correct, modify, or vacate the arbitral award rendered in the arbitration, or (3) enforce or execute a judgment based upon the award."

The plain language of the Compact reflects the Tribe waived its sovereign immunity, in regard to the state and federal courts, only for the purposes of compelling arbitration, reviewing awards rendered in arbitration, or enforcing or executing awards made in arbitration. The Compact does not reflect a waiver of sovereign immunity for purposes of suing the tribe directly for money damages in a state court.

Employees' complaint does not seek (1) to compel arbitration, (2) review of an award made in arbitration, or (3) execution or enforcement of an award made in arbitration. Rather, it is a complaint for money damages and demands a jury trial. Since the complaint did not fall within the Tribe's express waiver related to arbitration lawsuits/petitions, we conclude the trial court correctly found there was not jurisdiction because Morongo is protected by its sovereign immunity.

C. ARBITRATION

Employees contend the trial court should have "order[ed] the parties to arbitration before JAMS." Employees' complaint did not include a request for arbitration; rather, it contained a demand for a jury trial. Accordingly, we conclude the trial court was correct in not ordering the parties to participate in arbitration because Employees did not file a petition to compel arbitration—the issue was not before the trial court. (See *De Angeles v. Roos Bros., Inc.* (1966) 244 Cal.App.2d 434, 441 [trial court correctly concluded issues not raised by the parties were "properly left to other proceedings between the parties"].)

Employees assert "the [t]rial [c]ourt erred in denying [Employees] their opportunity to request and obtain an order compelling Morongo to submit to arbitration." (Code Civ. Proc., § 1281.2.) We infer Employees are asserting they would have amended the complaint to include a request for arbitration if they had been granted leave to amend. (See *GMS Properties, Inc. v. Superior Court in and for Fresno County* (1963) 219 Cal.App.2d 407, 411, 414-415 [granting a motion to quash is not the terminal stage of the litigation].) Employees do not explain how they would have amended the complaint such that the trial court could have compelled arbitration, if they had been granted leave to amend. (See *Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 781 ["plaintiff must demonstrate how the complaint can be amended"].) For example, assuming Employees' claims fall within

tort law,[3] Employees do not explain if they have satisfied the administrative exhaustion requirements that precede the arbitration of tort claims. (Morongo Band of Mission Indians Amended Tort Liability and Patron Claims Ordinance, §§ 8.2-9.1.) Therefore, we find Employees' contention to be unpersuasive.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.

[3] Morongo asserts Employees' claims are not based upon tort law. The issue of whether Employees' claims are the proper subject of arbitration per the Compact is not before us because the trial court did not issue an order related to arbitration due to a petition to compel arbitration not being filed. (See *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, 712 [generally, an appellate court will not review an issue that was not before the trial court].)